



Date: May 21, 1998

Case No. 97-INA-469

In the Matter of:

BLACK ANGUS RESTAURANT,
Employer,

on behalf of:

ALFREDO GONZALEZ,
Alien.

Appearance: Aldo Beretta, Esq.

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of the alien by the employer under §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a) (5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656.¹ After the Certifying Officer (CO) of the U.S. Department of Labor(DOL)denied the application, the Employer requested review pursuant to 20 CFR § 656.26.²

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

THE CO'S DECISION

Employer seeks to fill the position of Cook, Specialty with DOT Title Cook, DOT # 5812 313.361-014, a wage offer of \$11.90 per hour, job duties of:

Responsible for preparing, seasoning & cooking dishes such as grilled teriyaki chicken, grilled marinated chicken, baby back pork ribs, prime rib roasted & grilled w/cracked peppercorns, prime rib roasted & grilled w/herb butter, baked salmon, king crab legs, grilled prawns, lobster, New York steak & whiskey pepper steak; roasts, grills, smokes & steams meats, fish & vegetables; prepares desserts such as apple walnut cobbler, New York cheesecake & other desserts & foodstuffs; must know how to prepare all these dishes according to recipes or knowledge as the recipes must be prepared from scratch; must also be able to make up new recipes to improve menu. (EMPLOYER PAYS FOR LUNCH BREAK) (AF 38)

Reads menu to estimate food requirements and order food from supplier or procures food from storage. Measures & mixes ingredients according to recipe from scratch, using a variety of kitchen utensils and equipment such as blenders, mixers, grinders, slicers & tenderizers. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters and steam kettles. Observes & tests food being cooked by tasting, smelling & piercing with fork to determine that its's cooked. Carves meats, portions food on serving plates, adds gravies & sauces & garnishes servings to fill orders. (AF 39)

and job requirements of two years' experience in the job offered.

The application was denied by the CO on the basis of lack of good-faith efforts to recruit and the unlawful rejection of qualified U.S. workers. (AF 13-17)

ISSUES ON APPEAL

On appeal, employer seeks review of the contentions, among others, that the time spent interviewing 24 applicants, while overseeing the daily operations of the restaurant was representative of his good-faith recruitment efforts. Also, employer maintains that the three applicants whom the CO chose to single out as examples for her basis of the denial of

certification, either did not respond to their scheduled interviews or did not possess the necessary qualifications for the job. (AF 1-3)

DISCUSSION

Employer's arguments on appeal concerning good faith recruitment of Gregario, Anduiza and Ramirez are not persuasive. Employer attempts to excuse the 5 week delay in scheduling Gregario's interview, which the NOF and the FD found may have discouraged U.S. workers. Employer argues that the large number of applicants - 24 - and the manager's other duties precluded him from interviewing sooner. (AF 1-2) An unjustified delay in contacting U.S. applicants, when it was feasible to contact them earlier is presumed to contribute to an applicant's unavailability. *Creative Cabinet and Store Fixture*, 89-INA181 (Jan. 23, 1990) (*en banc*). Failure to timely contact U.S. applicants indicates a failure to recruit in good faith. *Loma Linda Foods, Inc.*, 89-INA-289 (Nov. 26, 1991) (*en banc*) While 24 is a relatively large number of applicants, neither that number nor the other duties of the manager in a busy restaurant justifies such a lengthy delay in scheduling an interview, considering the nature of the position being filled. Priority must be given to the recruiting process in order to qualify for alien labor certification.

Regarding late delivery of the recruiting letter to Anduiza only the day before the scheduled interview, employer argues that "if the applicant was interested in the position the applicant should have phoned to state that there was an interest, but the letter arrived too late. An interested applicant would put forth an effort such as a phone call." (AF 2) However, it is well established that it is the employer's burden to provide applicants with timely notice of interview. As stated in *Nicholas Huizar*, 91-INA-178 (May 18, 1992):

We have held also that an employer must give the applicants adequate time to respond to its request for an interview. *Tempco Engineering, Inc.*, 88-INA-101 (June 20, 1988). In this instance, we find five days from the date of the certified mailing to the date of the first scheduled interview to be inadequate. Accordingly, certification was properly denied in this case.

Under such circumstances it would be the employer's responsibility to follow up with further contact.

Concerning Ramirez the employer argues that his experience as a kitchen manager whose duties "involve cooking" do not qualify him for a position where "The duties do not involve cooking, the duties are cooking." (AF 3) This argument is an exercise in semantics which does not overcome the FD conclusion that employer failed to justify this or the other 2 rejections discussed in the NOF and FD.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

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